

IN THE SUPREME COURT
REPUBLIC OF NAURU

Constitutional Reference No. 01/2004

In the matter of Article 55 of the
Constitution

Reference re Dual Nationality and other questions

OPINION

The Reference Procedure

1. The President with the approval of Cabinet on 15 September 2004 referred questions involving the interpretation or effect of certain provisions of the Constitution pursuant to Article 55.

2. The questions asked were the following:-
 - A. Can a person of dual citizenship, of Nauru and other citizenship, be a member of Parliament of Nauru?
 - B. The effects of Articles 30, 31, 36 and 75 of the Constitution of Nauru on membership of Parliament?
 - C. Was the Speaker empowered to suspend the Hon. Kieren Keke before the Supreme Court was referred the above questions?

3. Under the normal procedures such a reference was gazetted, G/N No. 256/2004, written submissions were called for, and to be submitted by 4pm 22 September, 2004, and a date set, Thursday 23 September 2004, for a hearing for the purpose of receiving any additional oral

submissions. Eight written submission were received by the Acting Registrar and four oral submissions were made by those who had earlier submitted in writing. Those persons who made submissions are listed in the Appendix to this Opinion. The Court is indebted to such persons who made submissions both for the time spent and the quality of the submissions.

Nature of an Opinion

4. The referral provision in the Constitution is an unusual process, not always available under other written constitutions but, nevertheless, Article 55 has been used on a number of occasions in Nauru. It is unusual in that Courts will not normally exercise jurisdiction in a case without a justiciable matter. Courts normally will not conduct a case on a hypothetical question. However, under Article 55, the Court is enjoined to give an Opinion when Cabinet, and only Cabinet, desires an interpretation or effect of a provision of the Constitution where the question has arisen or appears to the Cabinet likely to arise. In this case, a question arose in the course of parliamentary proceedings from which the Speaker made a ruling resulting in the suspension of a member, the Hon. Kieren Keke MP. Following such suspension, the Court was asked to give an Opinion on particular questions.

5. On account of the nature of Article 55, the Court must limit itself to the questions asked. Whilst the Court gives what is termed an Opinion, one must realize that it is a constitutional opinion based on law. Such an Opinion carries legal weight, so far as it goes, but it must itself be susceptible to the normal canons of interpretation in the event of a particular disputed question brought before the Court.

Question A.

6. I now turn to the Opinion itself. Question A, so it appears to the Court, is the crux of the matters asked. Considered in another way it asks whether a person, currently possessing Nauru citizenship, is entitled to be a member of Parliament where he or she possesses, as well, the citizenship of another country.

7. It is clear beyond doubt that to be a member of Parliament, a candidate for membership must be a Nauruan citizen (Article 30) and be on the electoral roll, and thus entitled to vote (Electoral Act 1965-1992 S. 16). A Nauruan is defined in terms of the Electoral Act 1965-1992 S. 3, as a Nauruan citizen as defined in the Constitution of Nauru.

8. 'Citizenship' in Nauru is provided for under Part VIII of the Constitution. As the former Chief Justice stated, in words with which I agree, in Lucy Ika & Anor v Nauru Lands Committee & Ors, (unreported) by judgment dated 21 August 1992 at p48, 'After Independence Day on the adoption of the Constitution, status of membership 'of the Nauruan Community' ceased and that of 'Nauruan citizenship' replaced it.' This was clearly shown by the words of the Constitution contained in Articles 71, 72, 73 and 74. Furthermore, Article 75 provided that thereafter Parliament could make provision both for acquisition, deprivation and renunciation of citizenship. The Constitution, therefore, provided the basis of Nauruan citizenship and permitted, thereafter, Parliament to add provisions to the extent allowed in Articles 75 (1), 75 (2)75 (3) and 75(4). This is all clear enough.

9. Somewhat unfortunately, the clarity of the citizenship articles in the Constitution have not been fully mirrored by the subordinate legislation. The Nauruan Community Ordinance which came into force in 1956 as a pre-independence Ordinance of the then administering power, Australia, was drafted using the nomenclature of the Nauruan Community and not that of citizenship, the latter term being not appropriate until Nauru achieved independent sovereignty and statehood.

10. In 1997, when amendments were first made to that Ordinance to accommodate the Citizen Investor scheme and make provision for an application under Article 74, the opportunity was missed to re-draft the Ordinance as

a Citizenship Act, with the result, for example, Section 3 (1) (b) of the amending Act has to play with various terms which are not on all fours with the tenor of the Constitution. As the former Chief Justice stated the term member of Nauruan Community ceased with independence and became Nauruan Citizen under the Constitution. There can be no distinguishing characteristic after 1968 in terms of citizenship between those who become citizens either under Articles 72 (1) and (2), 73, 74. All of them are classed as Nauruan citizens under the Constitution. I withhold any view on the Citizen investor scheme but I notice under Section 6 of the amending Act that a person who has been granted citizenship has then eligibility for a Nauruan passport, and 'shall have all the rights and privileges provided by law for a citizen of Nauru.' I simply add that this scheme is almost predicated on the fact that the person applying is already a citizen of another country, yet section 8 of the very same Act, the Nauruan Community Act 1956-1997 states that a Nauruan who acquires the nationality of another country by some voluntary or formal act, other than marriage, ceases to be a Nauruan. Nauruan here has the meaning of a 'Nauruan citizen'.

11. At this moment of time, the following are entitled to Nauruan citizenship –
 - (1) A person who before 30 January 1968 was included in one of the classes of persons who constituted the Nauruan Community within the meaning of the Nauruan Community Ordinance 1956-1966 (Article 71)

- (2) A person born on or after 31 January 1968 if both parents were Nauruan citizens at the date of birth of the person. (Article 72 (1))
- (3) A person born on or after the thirty first day of January 1968 if born of a marriage between a Nauruan citizen and a Pacific Islander and neither parent has within seven days after the birth of that person exercised a right prescribed by law in the manner prescribed by law to determine that that person is not a Nauruan citizen. (Article 72 (2))
- (4) A person born in Nauru on or after 31 January 1968 if, at the date of the person's birth, the person would not, but for the provisions of this Article, have the nationality of any country (Article 73). This Article avoids statelessness.
- (5) A women, not being a Nauruan citizen, who is married to a Nauruan citizen or has been married to a man who was, throughout the subsistence of the marriage, a Nauruan citizen, is entitled, upon making application in such manner as is prescribed by law, to become a Nauruan citizen. (Article 74) Also see S. 7 Nauruan Community Ordinance Amendment Act 1997, and the judgment of Donne C.J. in the 1992 Ika's case, earlier cited, at p.51 where because of the citizenship entitlement and no process then being available to apply for it, the person was held to be deemed a Nauruan citizen in terms of the Constitution.

- (6) A person accepted by Cabinet as a Citizen investor under Section 6 of the Nauruan Community Ordinance Amendment Act 1997.
(Article 75 (1))
- (7) The spouse and minor children of a citizen of Nauru granted citizenship under the citizen investor scheme pursuant to S.6 Nauruan Community Ordinance Amendment Act 1997. (Article 75 (1))
- (8) A Pacific Islander accepted by Cabinet as a Nauruan citizen under Section 5 of the Nauruan Community Act 1956 – 1997 . (Article 75 (1))

The Legal Principles of Citizenship

12. Countries are not uniform in their approach to citizenship. However, as Brownlie states in his Principles of Public International Law (Fourth edition) at p.387, "The two main principles on which nationality is based are descent from a national (Ius Sanguinis) and the fact of birth within state territory (Ius Soli)". Those two principles indeed predominate.

13. In Nauru, for example, stress is given to descent under the Ius sanguinis principle. In those established criteria, in paragraph 11 above, for entitlement to citizenship numbers 1 and 2 are clear examples of that principle, whereas number 4 is a Ius Soli example. However, a common variation is provided through marriage. In the case of Nauru, a woman possessing nationality of another state is entitled to citizenship upon marriage to a Nauruan citizen. It is noticeable, too,

that under Section 8 of the Nauruan Community Act 1956-97, a marriage by a Nauruan citizen, man or woman, does not affect the Nauruan citizenship of that person when he or she acquires nationality of another country. The category of citizen investor defies the normal principles.

Dual Citizenship

14. Whilst many countries have statutes which do not allow dual citizenship, it has been found over years that for various reasons states have to accommodate in some form or another a citizen having or possessing the citizenship of another country.

15. In Nauru, the most obvious example occurs under section 8 of the Nauruan Community Act 1956-1997 where a person, man or woman, already a Nauruan citizen, through an act of marriage acquires the citizenship of another state. In such circumstances, the Nauruan citizenship is not affected. He or she, therefore, for Nauruan purposes carries dual citizenship.

16. The most clear example of dual citizenship occurs under the citizen investor scheme where it is almost a sine qua non to possess another nationality before making application. Once the application is granted, that person possesses dual citizenship.

17. Under Article 74, a woman, not being a Nauruan citizen, but inevitably possessed of another nationality or citizenship, is entitled to become a Nauruan citizen upon marriage to a Nauruan citizen, or where that person was married

to a man who was throughout the subsistence of the marriage a Nauruan citizen. Again, the woman gaining Nauruan citizenship under Article 74 is then possessed of dual citizenship.

18. It may also occur in the case of a Pacific Islander who is granted Nauruan citizenship under the Nauruan Community Act 1956 – 1997.

19. Both the citizen investor and the Article 74 woman are the reverse process of Section 8 of the Nauruan Community Act 1956-1997 and are not susceptible to its sanction. In fact, there appears to have been some positive policy support for the position under the citizen investor scheme, at least until recently, and no hint of difficulty under Article 74.

20. Consideration should now be given to Article 75 (2) and Section 8 of the Nauruan Community Act 1956-1997.

21. Following the provisions of Articles 71, 72, 73 and 74 descriptive of who are Nauruan citizens, the Constitution then leaves to Parliament in Article 75 to determine who else might acquire Nauruan citizenship, who may be deprived of Nauruan citizenship through acquisition of another nationality or otherwise, and the means for renunciation by a person of his Nauruan citizenship.

22. Article 75 (2) states -

‘(2) Parliament may make provisions for depriving a person of his Nauruan citizenship being a person who has acquired the nationality of another country otherwise than by marriage’.

23. Since Independence, Parliament, in 1997, has legislated for acquisition of Nauruan citizenship under the citizen investor scheme and has also provided an application mechanism for Nauruan citizen entitlement under Article 74. As noted above, these provisions were introduced as amendments to the old Australian ordinance of 1956, Nauruan Community Ordinance, which to that time had never been amended to accord with the constitutional provisions. Nevertheless, the Nauruan Community Ordinance 1956 – 1962 was in force after Independence by reason of Article 85 (1) of the Constitution.

24. Section 8 of the Nauruan Community Ordinance 1956 – 1962 read as follows:-

‘8. A Nauruan who

(a) acquires the nationality of another country by some voluntary and formal act, other than marriage;

or

(b) became a Nauruan otherwise than by reason of his birth in the Island of Nauru and ceases to be ordinarily resident in the Island of Nauru within ten years after the date of his admission to the Nauruan Community,

ceases to be a Nauruan’.

25. In the definition section of the said Ordinance (Section 2 (1)) the definition of Nauruan is as follows:-

“Nauruan” means a person included in one of the classes of persons who constitute the Nauruan community.

26. The first point to make on the above sections is that the Ordinance at the time of Independence as a law was not in line with the Constitutional provisions, nor was it immediately adapted or amended as was allowed for under Article 85(6) of the Constitution. Nevertheless, by reason of Article 85(5) the earlier prescription, that is before Independence, will be in force as a law under the Constitution to be prescribed or otherwise provided for. But, of course, it must be in conformity with the Constitution. The Constitution as the supreme law of Nauru has a control over the Ordinance and not the other way around. A law that is inconsistent with the Constitution is to the extent of the inconsistency void. (Article 2 (2)) Without further exploring the issue, there must be some constitutional doubt about section 8 as it originally stood, that is, until 1997.

27. However, in 1997, some amendments of a drafting nature were made. I have already alluded to the inconsistency now of the use of the term in law, given the Constitutional provisions, of 'member of the Nauruan Community' instead of 'Nauruan citizen'. The other amendments which were made in 1997 may have effected a correction, at least to section 8, to bring it back to something resembling Constitutional conformity. The particular amendments were contained in Section 3 (1) and Section 4 of the Nauruan Community Ordinance Amendment Act 1997.

28. The first amendment was to section 2(1) of the 1956-1962 Ordinance where a new definition was added as follows:-

'Citizen of Nauru' means either

- (a) a person who is a citizen pursuant to Part VIII of the Constitution,
- or
- (b) a person admitted as a member of the Nauru Community, or
- (c) a Citizen investor as provided in this Act

29. The second amendment was contained in section 4(c) which replaced references to being, becoming or having become 'a Nauruan' by references to being, becoming or having become a 'Nauruan citizen.'

30. The first amendment is curious for (b), a person admitted as a member of the Nauru Community, in whatever manner it is explained, is encompassed within Part VIII of the Constitution. It is not a separate category in law under the Constitution. It appears to have been partly covered by the new section 4A in the amended Act but the artificiality of the preservation of a non-constitutional terminology remains. The citizen investor on the other hand arises from parliamentary action pursuant to Article 75(1), but even there must fall within Part VIII of the Constitution. Indeed, the definition of 'Nauruan citizen' in the Passports Act 1997 gets closer to constitutional acceptance where it is defined as 'a person who is a Nauruan citizen within the meaning of the Constitution or the Nauruan Community Ordinance 1956-1997'. Apart from the point that the Ordinance had become an Act in 1997, it records that apart from the citizen provisions of the Constitution one must look to the Nauruan Community Act, pursuant to Article 75(1) of the Constitution, for others who may be granted citizenship, namely, certain Pacific Islanders and Citizen investors.

31. At least since 1997, however, section 8 may stand up to legal scrutiny as a provision that operates constitutionally in accordance with Article 75(2).

32. If that now be the position then one needs to look at the terms of Section 8, particularly paragraph (a). Under that provision a Nauruan citizen ceases to be a citizen if that citizen acquires nationality of another country by some voluntary and formal act other than marriage.

33. First, a person who is Nauruan who then marries and acquires nationality of another country through the act of marriage does not cease to be a Nauruan citizen under Nauruan law. Clearly there is an allowance there for dual nationality. It is not clear in section 8, where the marriage gives a conditional right to privileged naturalization procedure, that that was in contemplation by section 8. Nauru has espoused a principle of family unity in Article 74, and, perhaps looking at the reverse situation section 8 would follow the same course by a broad approach to the significance of the words 'other than marriage' but it has not been as yet a matter of argument in the Court.

34. Secondly, a Nauruan citizen who acquires nationality of another country 'by some voluntary and formal act' ceases to be a Nauruan citizen. The emphasis here is upon 'voluntary' and 'formal act'. If the acquisition occurs automatically or 'without formal application and conferring' then such acquisition does not fall within the strictures of the section. The most likely means of acquiring a nationality otherwise than by a voluntary and formal act is to be granted it by birth or descent. Sometimes this is expressed 'ex necessitate juris' or 'from a requirement of the law'. However, the terms 'voluntary and formal act' are common terms in nationality law and are clearly descriptive of the situation where there is voluntarily a formal application made for naturalization. This is, however, a grey area and when it arises it requires consideration of all the facts associated with the particular case and knowledge of the other country laws granting citizenship. Status of a citizen can not be idly considered one way or another.

35. If, indeed, a Nauruan acquires nationality of another country by a means other than through a voluntary and formal act then he or she would not cease to be a Nauruan citizen and would hold dual nationality. As such it would be a further category of person who may hold dual nationality in addition to those stated in paras 15, 16, 17, 18 and 33 of this Opinion.

Further comment

36. There is no constitutional law which prevents a Nauruan citizen possessing dual nationality from being a member of Parliament, so long as he or she is not in contravention of S.8 of the Nauruan Community Act 1956-1997, and is qualified in terms of Articles 30 and 31 of the Constitution. There is not a constitutional provision as occurs, for example, in the Australian Constitution, Section 44(1), where a dual national is disqualified from membership of the Australian Parliament. The qualifications for membership of Parliament are those of age and citizenship together with being an enrolled elector.

Question B.

37. I do not propose to reiterate what I have already stated about the effects of Articles 30, 31, 36 and 75 of the Constitution upon membership of Parliament.

38. Where a question arises concerning the right of a person to be or to remain a Member of Parliament that matter should be referred to and be determined by the Supreme Court under the procedure of Article 36. Anyone having sufficient

interest may bring the case whether it be the Speaker, the member himself, other members of Parliament or electors. Article 36 has been litigated where a member has been absent without leave of Parliament under Article 32(1)(d). Article 36 provides the jurisdiction for the Court to determine whether a member may be or can remain a member. The Court would consider, qualification, disqualification or pertinent matters in Article 32.

39. As the Court has established earlier Article 75 enables Parliament, not inconsistently with Articles 71, 72, 73 and 74 to legislate from time to time on matters of citizenship within the confines of Articles 75(1), (2), (3) and (4). From a reading of the Nauruan Community Act 1956-1997, Parliament has indeed made some legislation regarding the first three paragraphs of Article 75 but not Article 75(4).

Question C.

40. The matter of the suspension of the member arose in the course of parliamentary proceedings during questions without notice. The Speaker made a ruling after consideration, which ruling, as the Court is informed in the Speaker's submission, was the subject of a division which favored the Speaker's ruling. It is apparent, this matter occurred in the Parliament, was handled by the Speaker and Parliament, and, of itself, did not at that stage raise any breach of the Constitution. Under the normal principles, well known to parliamentary members, a Court will not intervene in such a matter. Furthermore, as it does not prima facie raise any constitutional issue, the Supreme Court cannot be called upon to give an Opinion under Article 55.

Summary

41. The Summary of the Opinion of the Supreme Court to the questions asked of it by Cabinet are:-

Question A

Can a person of dual nationality, of Nauru and other citizenship, be a Member of Parliament of Nauru?

Answer

There is no direct prohibition on a member of Parliament holding dual citizenship. However, citizenship in Nauru has a limitation on dual citizenship as expressed in Section 8 of the Nauruan Community Act 1956-1997. But dual citizenship falls outside the restriction in Section 8 of the Nauruan Community Act 1956-1997 in the cases where -

- a. a person upon marriage acquires citizenship of another country
- b. a person who is citizen of another country, acquires citizenship of Nauru under Article 74
- c. a person who is a Pacific Islander acquires citizenship of Nauru under the Nauruan Community Act 1956-1997
- d. a person who applies and is granted Nauru citizenship under the citizen investor scheme contained within the Nauruan Community Act
- e. the spouse and minor children of a person granted citizenship under the Nauruan Community Act.
- f. a person who has acquired the citizenship of another country without some voluntary and formal act.

Question B.

The effects of Articles 30, 31,36 and 75 of the Constitution of Nauru on membership of Parliament.

Answer

It is not necessary to answer this in detail. But the Court draws attention to the fact that where a question arises concerning the right of a member to remain a member of Parliament then the procedure for determining this issue is by referral under Article 36 to the Supreme Court. Such a referral will enable procedures to be established for a full hearing between the parties.

Question C.

Was the Speaker empowered to suspend the Hon. Kieren Keke before the Supreme Court was referred the above questions?

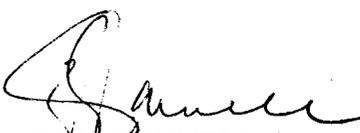
Answer

Not required to answer as it does not raise any question concerning the interpretation or effect of any provision of the Constitution as required by Article 55.

Conclusion

42. The Supreme Court has provided answers to the questions asked by Cabinet under the Article 55 referral power. However, the question whether the member has ceased to be a Nauruan citizen, a matter with considerable implications, has not been determined by this Opinion. One of the written submissions to the Court, namely that of the Hon. Kinza Clodumar, the Hon. Pres Nimes Ekwona and the Hon. Terangi Adam, has properly drawn attention to the point that the matter is still within the Parliamentary process and that the process should continue. The Court is in general agreement with that part of their submission, and adds that any Parliamentary process has now the benefit of the Court Opinion. In the meantime, the Honourable Kieren Keke remains a member of Parliament.

43. In this Opinion, the Supreme Court has drawn attention to the fact that, on a question of status, referral under Article 36, if required, is a better process necessitating, as it does a full court hearing. The status of citizens shall never be lightly dealt with and questions of nationality are often dependent upon the personal history and circumstances of the person rigorously tested against the operative legislation. The seeming urgency of the matter should never on status questions disturb the necessity for a full and fair enquiry under proper rules for the reception of evidence.


BARRY CONNELL
CHIEF JUSTICE
28TH SEPTEMBER 2004

APPENDIX

Written Submissions

- | | | |
|----|-------------------------------------|------------------------------|
| 1. | The Honourable Russell Kun MP | Speaker of Parliament |
| 2. | Mr. Lionel Aingimea* | Acting Secretary for Justice |
| 3. | The Honourable Kinza Clodumar MP | } and joint |
| | The Honourable Pres Nimes Ekwona MP | } supplementary |
| | The Honourable Terangi Adam MP | } submission |
| 4. | Nauru Law Society | |
| 5. | Mr. Vassal Gadoengin* | Pleader |
| 6. | The Honourable Rene Harris MP* | |
| 7. | Mr. Paul Ribauw | Pleader |
| 8. | The Honourable Remy Namaduk MP* | |

* Those persons asterisked also made oral submissions at the Court hearing on Thursday 23 September 2004.